IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner,*

v.

UNITED ARTISTS TELEVISION, INC., *Respondent.*

On Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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INDEX

Introduction 1

I. Petitioner's Antenna Systems Do Not Perform The Copyrighted Works 3

II. There Is a License Implied In Law To Receive Authorized Broadcasts Off The Air By Any Antenna The Public Chooses, Including a CATV 17

III. The Minimum Area Of The Public's Right To Receive Is The B Contour 29

Conclusion 37

TABLE OF AUTHORITIES

CASES:

Aro Mfg. Co. v. *Convertible Top Replacement Co.*, 377 U.S. 476 (1964) 18

Buck v. *Debaum*, 40 F.2d 734 (S.D. Calif. 1929) 17

Buck v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931) 3, 4, 5, 6, 11, 17, 19

Federal Communications Commission v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940) 32

Fox Film Corp. v. *Doyal*, 286 U.S. 123 (1932) 27

In re Shen-Heights TV Assoc., F.C.C. Docket Nos. 17391-94 (released Feb. 23, 1968) 25, 26, 36

Kalem Co. v. *Harper Bros.*, 222 U.S. 55 (1911) 3

National Broadcasting Co. v. *United States*, 319 U.S. 190 (1943) 33

United States v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961) 16

White-Smith Music Publishing Co. v. *Apollo Co.*, 209 U.S. 1 (1908) 3, 11, 13, 16

STATUTES AND RULES: Page

Communications Act of 1934:

47 U.S.C. § 325(a) 19, 35

Copyright Act:

17 U.S.C. § 1(c) 7, 8
17 U.S.C. § 1(d) 7
17 U.S.C. § 1(e) 6

Code of Federal Regulations:

47 C.F.R. ¶ 73.658 33

SPECIAL REPORT AND ORDERS OF THE F.C.C.:

Second Report and Order, Community Antenna Television Systems, 2 F.C.C. 2d 725, 6 Pike & Fischer R.R. 2d 1717 (1966) (herein cited as "Second Report and Order") 22, 23, 25, 30, 34, 35

TV Broadcast Financial Data—1966, F.C.C. No. 5317, Public Notice, released Aug. 25, 1967 29

Broadcast Revenues, Expenses and Income of Television Broadcast Industry—1956, F.C.C. No. B-49308, Public Notice, released Aug. 22, 1957 29

LEGISLATIVE MATERIALS:

Hearings Pursuant to S. Res. 201 on S. 1006 before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. (1966) 4, 14, 26, 35, 36

H. Rep. No. 2222, 60th Cong., 2d Sess. (1909), reprinted in *Nimmer on Copyright* (1967) 6

112 Cong. Rec. A5623-24 (daily ed. Nov. 1, 1966) 11

Hearings on Regulatory Agencies before the House Comm. on Interstate and Foreign Commerce, 90th Cong., 1st Sess., Ser. No. 90-1 (1967) 36

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PETITIONER'S REPLY BRIEF

INTRODUCTION

While this case has far-reaching consequences for community antenna television and its continued service to large segments of the public who have elected to use it for their television reception, decision of the case must necessarily rest on the facts concerning the operation of petitioner's community antenna television systems and not possible or theoretical operations of

some CATV system in the future. It is necessary to say this because respondent and amici seek to buttress their performance arguments with purported facts that bear no resemblance to the case before the Court.

Petitioner does not "sell programs" as asserted and heavily relied on by the National Association of Broadcasters (NAB);[1] petitioner does not delete advertising from the broadcasts in order to sell and insert its own advertising as respondent and nearly all amici seem to fear "may" happen some day. So far as we know, there is no such practice by any CATV systems. The court below found that the signals of all stations received were carried "without any editing or selection of programs." A. 1346. Petitioner does not originate programs and respondent's assertion that CATV "can, and some systems do originate some of their own programs" (Respondent's Brief (hereinafter "Res. Br.") 63) was answered by the court below when it noted that petitioner's systems did not originate, had no equipment to originate, and the added costs of new equipment to originate would be substantial. A 1349. While respondent and some amici raise the dread specter of CATV systems carrying signals from New York to Los Angeles if CATV is held not to infringe, microwave is not involved in this case (and in any event is subject to F.C.C. regulation); the systems before this

[1] This is not a "pay-TV" case. While respondent, and a number of amici emphasize some advertisements of petitioner referring to particular programs to attract subscribers to its systems, this does not constitute selling programs any more than can a television set manufacturer or rental service be said to be selling programs when they seek to attract purchasers or renters by advertising the World Series or a prominent football game. Petitioner's fee was at a flat rate without regard to what programs, if any, were viewed by subscribers.

Court are within or near the Grade B contour, and in the service area of the stations whose signals are made available to subscribers.

I

Petitioner's Antenna Systems Do Not Perform the Copyrighted Works

1. The Solicitor General recognizes that to conclude that a CATV performs the copyrighted work requires that the copyright monopoly be extended to control a "new technology" not contemplated by the Congress when the existing Copyright Act was adopted and as to which "there is no direct evidence of congressional intent."[2] Memorandum for the United States as Amicus Curiae (hereinafter "Mem.") at 2. In that portion of his Memorandum dealing with a license implied in law, the Solicitor General discusses *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908), and distills from that case the principle which petitioner believes is applicable here in determining performance:

> ". . . Just as in *White-Smith* . . . where it was concluded that copyright protection [against mak-

[2] Respondent's position boils down to the contention that any "newer technology" (Res. Br. 19) must *ipso facto* be copyright infringement. The decisions relied on by respondent prove no such thing. In *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), the operations of the radio receiving system in the hotel were held to constitute a "performance" not because radio was a new development but because the operations of the hotel fulfilled the traditional meaning of "performance" by making available with its own equipment to its guests "the hearing of a copyrighted musical composition . . . ." 283 U.S. at 195-96. Similarly in *Kalem Co.* v. *Harper Bros.*, 222 U.S. 55 (1911), the Court's holding was not based on the novelty of motion pictures, but on the conclusion that the making of a movie based on a novel fit the carefully analyzed meaning of the statutory term "dramatize."

> ing a copy] did not extend to player piano rolls—a new development not contemplated by Congress—this Court could hold that until Congress acts specifically, it should not by its own action extend the copyright monopoly without any qualification into a wholly novel and uncontemplated area." Mem. 7.

To hold that off-the-air reception of broadcasts by CATV and transmission of the signals by wire or cable to subscribers is not a "performance" within the meaning of the Act would not only avoid such an unwarranted judicial extension of the copyright monopoly; it would also avoid the "potential for monopolization" (Mem. 6) as a consequence of imposing liability; it brings about a full "coalescence" (Mem. 16) of the copyright law, the antitrust laws and the Communications Act, and requires no change in the F.C.C. regulations under that statute.

Without referring to the rule which he finds established in *White-Smith*, or to the earlier views of the Department of Justice that "extension of copyright liability to CATV systems raises possibilities of harmful anticompetitive consequences and that this extension is not justified by valid considerations of the right to copyright protection,"[3] the Solicitor General suggests that the operations of the CATV "results in a 'public performance'." Mem. 4. His reasons are different from those asserted either by the courts below or respondent. Their reasoning turned centrally on the decision in *Buck* v. *Jewell-LaSalle Realty Co.*,

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[3] *Hearings Pursuant to S. Res. 20 on S. 1006 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., 211-212 (1966).

283 U.S. 191 (1931), and an analogy to broadcasting. The Solicitor General cites no authority for his performance theory and brushes aside the decision in *Jewell-LaSalle,* saying that whether or not that case is "directly pertinent" is not "of controlling significance." Mem. 2. He looks to *Jewell-LaSalle,* but solely for a "basic approach" (*id.*) to construing the statute "in light of new technology." Mem. 3. "[I]t seems clear," he argues, "that CATV systems engage in a significant array of activities directed toward providing television signals to persons at least some of whom would not otherwise be able to receive them . . ."[4] Mem. 3-4. The vague and undefined "array of activities" consists either of the "electronic process" or of the "substantial amount of things [the systems do] to permit their subscribers to receive signals" although the Solicitor General never says which is decisive or why either is relevant to his argument. Mem. 4.

The performance which "results" is never defined by the Solicitor General. It is not the "actual rendition" since that takes place in the "privacy of a number of homes, rather than in public."[5] Mem. 4. More-

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[4] The Solicitor General does not explain the relevance of his suggestion that "some" subscribers may not otherwise be able to receive the broadcasts. Whether or not the subscriber could use other means (their own antenna, or join a cooperative antenna system as done by others in Clarksburg and Fairmont) has no apparent bearing on the rationale proposed by the Solicitor General for finding performance.

[5] Despite the fact that the only rendition occurs in the home, the Solicitor General makes the unexplained assertion that "the image is present within the system and it is provided to the consumer by the CATV intermediary." Mem. 5. What "image" he is talking about is left undefined, presumably because it does not exist.

over, the rendition in the home, the actual viewing, is concededly non-infringing.

The Solicitor General, like the courts below, seeks support for his conclusion in an analogy, but he turns to an analogy not suggested by either of the courts below. He asserts that CATV does " 'reproduce' the copyrighted work in a 'manner' or by a 'method' as effectively as if the CATV system made a tape recording of the copyrighted work and offered it for sale. . . ."[6] Mem. 4. The analogy of a tape recording bears no resemblance to the facts of this case;[7] it is undisputed that petitioner's CATV systems neither embody nor produce any recordings or transcriptions (which would have been specifically covered by the

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[6] The Solicitor General uses the word "reproduce" (Mem. 3, 5) in this context, and the NAB in its brief suggests that this has special significance. NAB Br. 35 n. 76a. The significance of "reproduction" is made clear by the decision in *Jewell-LaSalle*, 283 U.S. 191 (1931), which NAB quotes: "the reception of a radio broadcast and *its translation into audible sound* . . . is essentially a reproduction" (*id.* at 199-200, emphasis supplied) which "amounts to a performance." *Id.* at 201.

The legislative history of the parallel provisions of § 1(e) (passed after the *White-Smith* decision) which conferred reproducing rights with respect to a musical composition, makes clear that the Congress was concerned with audible renditions of musical works. The Committee Report speaks of "reproduction of . . . music by phonographs, graphophones, or the ordinary piano-playing instruments." H. Rep. No. 2222, 60th Cong., 2d Sess. (1909), reprinted in *Nimmer on Copyright*, 959, 964 (1967).

[7] The analogy of making an undeveloped photograph (Mem. 4-5) is equally not apposite. To adapt the analogy of the undeveloped photo to the CATV case, the relevant question would be whether a person who transported (or transmitted) the undeveloped photo, made by someone else, to members of the public for whom the photo was intended, without being able to make it visible (*i.e.*, develop the photo), had made a copy or reproduced the photo.

language of §§ 1(c) and 1(d)),[8] and petitioner purports in no way to sell or display a record of a program, any interest in a program or a rendition of a program.

The Solicitor General's notion of a performance arising from a "substantial amount of things" (Mem. 4) done to permit subscribers to view the picture, like the magnitude-of-contribution theory of infringement of the court below (A 1353-54), opens the way to bring a wide variety of businesses within the control of the copyright monopoly. Certainly apartment-house master antennas which engage in the same "array of activities" as a CATV would be labelled as infringers. The "substantial amount of things" test similarly is sufficiently indefinite that it could cover set manufacturers, utilities which provide telephone lines connecting stations in a network, and many of the new technologies for communication which the district court recognized (A 103-104) are either already in use or on the horizon.

The "substantial amount of things" rationale also departs completely, of course, from the "ordinary sense" test of the meaning of the statutory words established by this Court in *White-Smith*.

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[8] The Act itself makes clear that the making and selling of a tape recording, without making the recorded work audible or visible would not constitute a "performance" or "reproduction" of the work; it would be covered, rather, by the exclusive right expressly granted by § 1(d), "to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced . . . ." See also the comparable exclusive right expressly granted in § 1(c) as well as the exclusive right in § 1(d) "to vend any manuscript or record whatsoever thereof . . . ."

2. Respondent, whose theory of performance bears little relation to the Solicitor General's theory, has endeavored to obscure the fact that under the Copyright Act two essential elements must be found before it can be concluded that there is infringement liability—a "performance" of the copyrighted work "in public." Unless there is a "performance," it makes no difference whether the acts are in public or in private.[9] Respondent confuses this issue of statutory construction by reiterating that petitioner's two CATV systems have a combined subscribership of 15,000. But it makes no difference if the number is 15 or 15,000 *unless* petitioner's community antenna systems perform the copyrighted work. If it were concluded that there is a performance, then and only then the number of subscribers may be relevant to the issue of "in public."[10]

The issue is and remains whether what petitioner's community antennas do is a performance. The district court faced this issue and found "performance" in the electronic operations of the equipment, which, by a process of statutory construction it called "semantic

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[9] Respondent's confusion is evident in its discussion of the *Remick* and *Messager* cases. Res. Br. 24-25. Both cases clearly recognize that the "performance" by a broadcaster takes place in the studio and both address themselves to the question whether the broadcast met the requirement of making the performance "public" (holding, of course, that it did). See discussion, Pet. Br. 43-47. Respondent attempts to distort these holdings by disregarding the "in public" requirement and pretending that the size of the radio audience was deemed relevant to the "performance" issue. Res. Br. 24-25.

[10] Similarly, neither the cost of the antenna service equipment referred to by respondent nor the fact that petitioner is providing the antenna service as a business for profit is relevant to the question of performance. Profit is an element which must be shown, in addition to performance, for infringement under § 1(e).

extension" (A 105 n. 21), it held should be treated "*as if* there were a classical performance." A 72 (emphasis supplied). There were two alternative technological theories. First, it found "performance" in the way the tubes (or transistors) in the equipment functioned; because of the way the circuitry was arranged, each tube made an "electronic reproduction" of the signal. The second theory, repeated here by the NAB in its brief, was that petitioner's equipment carried out the electronic function of "modulating" (shaping) the signal and hence the CATV's electronic operation was equivalent to that of a broadcasting station because a broadcaster *has* to modulate the signal in order to broadcast it.[11] NAB does not argue that the equipment is the same—it is not—its argument turns solely on the electronic process of modulation. The "modulation" theory which was respondent's original theory[12] and which respondent has now abandoned, is based on an error in fact. As the court below correctly found, petitioner at one time had a piece of equipment (a "Teletrol") which modulated the video carrier, but not the sound carrier. A 1348-49. Neither the modern equipment petitioner used at the time of trial nor the older equipment used before the Teletrol modulated the video or audio carrier. *Ibid.* The NAB's theory that a broadcaster performs and therefore CATV performs is built on "modulation" and falls because it is based on an erroneous assumption of fact that modulation is essential or typical of the operation of CATV

[11] NAB asserts that the electronic processes of CATV equipment and a broadcaster's equipment are "identical" (NAB Br. 36, 21-22) because a broadcaster's equipment and CATV equipment "modulates" (*id.* at 22 n. 30) the signal, or because of the "shaping [of the] electromagnetic waves" (*id.* at 36) by the CATV equipment.

[12] See Ex. D, E 339.

equipment—quite apart from the strange assumption that the issue of "performance" and copyright infringement could turn on the electronic treatment of an electromagnetic wave.

The court below rejected the district court's technological approach (A 1357 n. 9) and held that the "performance" was to be found in the "contribution" by the antenna system to viewing by subscribers; a "contribution" to something—*i.e.,* viewing—which is concededly non-infringing. ASCAP, in its brief amicus, argues several variants, that petitioner is "engaged in the presentation of," "responsible for," or "responsible for participating in," a performance (ASCAP Br. 13), but it is never clear who is putting on the performance in which the petitioner is "participating" or for which it is "responsible." If the performance is in the homes, then petitioner is "participating" in a non-infringing activity. If the performance is in the television station, it is licensed and non-infringing.

In its present brief, respondent rejects its earlier technological theory by agreeing with the court below that "the technical means by which the result is produced are irrelevant." Res. Br. 19. But despite that concession, it argues that "amplifying, processing and retransmitting the electromagnetic radiation" by petitioner's systems (Res. Br. 16) is a "performance." Every radio set, every television set, every master antenna and every common carrier does exactly the same electronic operations which respondent argues is the performance.

Respondent now also urges for the first time that the performance lies in "communicating the pictures and sounds which comprise it [the copyrighted work], in whatever form they may be, to where they will be-

come visible and audible to prospective viewers . . . ." Res. Br. 16. This latest theory departs furthest of all from any recognizable meaning of the statutory term "to perform"—the term whose "ordinary sense" and "common understanding" (*White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1, at 16-17) this Court emphasized and applied in the *Jewell-LaSalle* case when it repeatedly pointed out that the acts and equipment of the hotel had brought about not only the reception of the broadcast but its "translation into audible sound" (283 U.S. at 199-201). Respondent's theory might be appropriate if the statute had granted an exclusive monopoly of the right to "communicate" or "transmit" the copyrighted work; it has no application to the right "to perform". The theory would hold every telephone and telegraph company, every apartment-house master antenna and, indeed, every individual television antenna inasmuch as the wire from the antenna to the receiver serves the forbidden function of "communicating the picture and sound," in their electromagnetic "form" "to where they will become visible and audible . . . ."[13]

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[13] While the communicating theory might benefit respondent, it has far-reaching consequences for the public now and in the future, for its adoption would result in prejudging the question of copyright infringement for many future means of communication which are now expected.

> ". . . there has been a proliferation of new types of communication: the laser beam, video-telephones, educational TV programming, time-sharing, data processing information and communication systems that are feasible on a continental basis. . . .
> . . . .
> "The home of the not-too-distant future will become an electronic library with ready access to the world's great literature, scientific achievement, the lives and deeds of great men." (Gerald L. Phillippe, Chairman of General Electric Company. Remarks reprinted, 12 Cong. Rec. A5623-24 (daily ed. Nov. 1, 1966).

Respondent's new theory rests on a confusion of the broadcast signal (the electromagnetic energy) with "pictures and sounds which comprise [the copyrighted work]." Respondent has been frank in acknowledging that it does not and cannot claim copyright in the electromagnetic energy received and transmitted by petitioner's CATV. That electromagnetic energy does not become "pictures and sounds which comprise" the copyrighted works until they become "visible and audible to prospective viewers" in their homes, and respondent is aggressive in its assertion that viewing by subscribers is not infringement or, indeed, even within the copyright monopoly.[14] Res. Br. 23, 34, 43.

This new "communicating" theory, like the transmission theory in its brief in opposition, departs completely from the court below. Respondent sharply separates "performance" from viewing, arguing now that the viewing by subscribers is not covered by the copyright monopoly. Res. Br. 34. The court below, on the contrary, regarded the viewing as essential to its theory of performance, for it was the "contribution" to the viewing which was the "result" the court found decisive in determining performance. Respond-

[14] Respondent has just lately arrived at that position. In the court of appeals, respondent expressly reserved an infringement claim against "defendant's commercial subscribers" who maintain television sets open to the view of the public (Brief for Plaintiff-Appellee at 68 n. 73), and asserted also that "defendant's subscribers, who . . . enjoy the reproduction and performance of the television programs 'in the privacy of [their] home,' participate both realistically and in contemplation of law, in a *public* performance." *Id.* at 40-41 (emphasis in original). Of course, if petitioner's CATV systems were held to infringe, it would still follow that the subscribers who contract for petitioner's service might be liable as contributory infringers—a possibility that respondent still finds attractive. Res. Br. 27-28.

ent now concedes that the question whether petitioner has performed must be judged without regard to, and separate from, the viewing. Viewing may be relevant to the question whether the performance is "in public," but the argument for performance by the CATV system must be based on the reception and transmission of the broadcast signal by the CATV system without regard to the public's viewing on their own sets, and cannot be based on the public's viewing on their own sets.[15]

In *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1, 17 (1908), this Court said that the statutory words should be construed in accordance with their "common understanding." This disparate array of "understandings" put forth by respondent and its supporters as to what constitutes the alleged "performance" by petitioner's antenna service is ample demonstration that none of these theories embodies any "common understanding." The district court was correct in effectively conceding that the "words 'to perform' as commonly used in everyday speech by the average layman are not intended to encompass the aggregate or composite of the acts of [petitioner's systems]". A 67. This Court should adhere, as it did in *White-Smith*, to the commonly understood meaning of the statutory word.

3. The Solicitor General sets forth the serious consequences arising from the conclusion that the recep-

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[15] Respondent urges application of the principle in *Kalem*, 222 U.S. at 61, that the test (in construing the statutory word "dramatize") is whether "we see the event or story lived." Res. Br. 16. When there is no sight or sound in the method or system of "communication," one does not "see" the event or story lived; there is nothing but electromagnetic energy. One "sees" the story lived in the homes, but, as respondent concedes, that is non-infringing.

tion off the air of a broadcast licensed by the copyright owner and the transmission of the signal to subscribers, without sight or sound, is a public performance of the copyrighted work.

CATV systems, started in 1949, are for the most part located in small towns and are operated mainly as small businesses.[16] The Solicitor General, like the Department of Justice in earlier testimony,[17] is concerned with the anticompetitive consequences of imposing copyright liability on CATV. Mem. 7 n. 4. Imposition of copyright liability means that CATV will fall under the control of the few large copyright owners. This could occur as a consequence of the burden of back liability, a liability which in a single month would exceed the cost of the systems if damages "not less than $250.00 for each infringement" (the statutory minimum) were assessed for the reception of each broadcast of a copyrighted work, as respondent here demands. A 154.[18] NAB urges that minimum statutory liability is not mandatory and would not be imposed (NAB Br. 53-61), but ignores the fact that without regard to the burden of past liability, the complete absence of bargaining power on the part of

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[16] See amicus brief of National Community Television Association, Inc. at 6.

[17] *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 3, at 211-215, quoted in petitioner's main brief at 62-64.

[18] A CATV system such as petitioner's capable of receiving the broadcasts of 5 stations will receive about 1500 broadcasts a week of which at least 1000 are copyrighted. This is exclusive of copyrights on music which may also be broadcast. If liability for past infringements were assessed at the statutory minimum of $250.00 as claimed by respondent for the reception of each broadcast, the liability for one week exceeds $250,000.00 and for one month exceeds $1,000,000.00.

CATV systems would still subject them to the control of the copyright owners. Thus the Solicitor General sees no way to deal with the problem facing a CATV operator in negotiating licenses where he has no control over the programming and does not even know what is to be broadcast, until after the event. In its brief, ASCAP describes the task of negotiating music licenses without an ASCAP-type organization as "impossible."[19] ASCAP Br. 8. Obviously, as the Solicitor General notes, there would be no provision for "reasonable royalty arrangements, compulsory licensing in certain areas, or a workable royalty payment scheme." Mem. 17.

Thus, the danger is real, as the Solicitor General recognizes, that the "relatively diffuse" CATV industry will come under the control of "three networks and seven major movie studios" in whose hands "television programming is concentrated." Mem. 7 n. 4. This control, moreover, could destroy the potential future development of CATV "in the public interest." *Ibid.*

Respondent (Res. Br. 28) and the NAB (NAB Br. 38) attempt to get around the fact that their respective (and differing) theories of performance mean that infringement liability will be imposed on apartment-house master antennas. Respondent asserts (Res. Br. 28) that petitioner's systems "did not involve any such apparatus [as master antennas], and that no such question was considered below . . . or is now before this Court." This is misleading. Respondent's own expert testified that the function of an apartment-

[19] We submit that the Court should not strain to find performance since it will encourage, or indeed require, the creation of a new ASCAP-type organization to license CATV.

house antenna was the same as that of petitioner's antenna systems (A 641-642), and the court rejected petitioner's offer to prove that the equipment is the same. A 902-904. The issue is in effect before the Court since respondent's theory of performance covers the master antenna.

The NAB argues, contrary to the record, that an apartment house furnishes "no elaborate transmission facility" like CATV,[20] that it does not advertise, and that all the apartment house does is simply to supply an antenna in the same way a refrigerator is furnished.[21] The theories of respondent and the amici cover the apartment-house antennas and threaten the television service that millions of apartment dwellers now enjoy.

The consequences of extending the copyright monopoly to cover this novel area are relevant to a determination as to whether "performance" should be given a strained construction to cover the operations of petitioner's community antenna systems. The rule of construction which the Solicitor General concludes was established in *White-Smith* (see pp. 3-4 *supra*) points to the conclusion that there was no performance.

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[20] See *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 564-65 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

[21] In fact many apartment houses charge a separate fee for the antenna service, but is it legally significant that an apartment dweller pays for a master antenna service in his rent while a householder pays directly for a community antenna system? It is hard to see how NAB's reference to advertising is relevant. Would an apartment house be an infringer if it advertised its master antenna service and petitioner not be an infringer if its advertising never referred to a program the subscriber could view?

II

There Is a License Implied in Law To Receive Authorized Broadcasts off the Air by Any Antenna the Public Chooses, Including a CATV

1. In the third part of his Memorandum, the Solicitor General concludes that there is a license implied in law to receive authorized broadcasts with the assistance of a CATV in a station's service area (which he limits by the Grade B contour).[22] While, as we shall discuss later, we believe that the license implied in law (assuming *arguendo* that there is a performance by the CATV system, which petitioner denies) extends to all simultaneous off-the-air reception, petitioner agrees that the area within which there is a license in law to receive is at least as broad as the Grade B contour, which the Solicitor General calls the normal service area. Mem. 14-15.

It is clear, moreover, that the right of the public to receive stems, as the Solicitor General concludes, from a license implied in law, not a license implied in fact, as respondent now tries to urge. Res. Br. 37-38. The issue reserved in *Jewell-LaSalle,* 283 U.S. at 198, 199 n. 5, was whether there was a license implied in law for reception off the air of an *authorized* broadcast (in *Jewell-LaSalle* the broadcast was not licensed).[23] The courts below had no doubt on this score. The

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[22] The Solicitor General's "caveat" to the license implied in law is discussed at pp. 29-34 *infra*.

[23] The Court's citation of *Buck* v. *Debaum,* 40 F.2d 734 (S.D. Calif. 1929), of course did not necessarily imply "acceptance" of that case (see Res. Br. 29 n. 10), since the Court was reserving the question, but the issue on which judgment was being reserved was plainly the issue decided in *Debaum*—the issue of a license implied *in law*.

court of appeals held that the record presents as a matter of "appellate first impression" (A 1360) the question whether a license "should be implied in law." A 1358. And the trial court described the issue as "not whether there *is* an implied in law license" but "whether there *should be.*" A 88 (emphasis in the original).

Respondent's argument based on the patent cases (Res. Br. 37-38 & n. 14) that the courts have only upheld a license implied in fact and that a license will not be implied if the patent owner's intentions are "otherwise" is without foundation. In *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 377 U.S. 476 (1964), there was a specific attempt by the patent owner to reserve the right to license sales of replacement fabrics and the patentee's attempt to limit use by contract was overridden since the license to use was implied in law. *Id.* at 497.

Respondent's argument (Res. Br. 43-44) that the rule of *Aro* has no applicability because "the public certainly has no license publicly to perform the copyrighted work in the manner petitioner performs it" disregards the problem of the audience (*i.e.*, the public) for which the broadcast was as a matter of law intended. In substance, this narrow construction of the *Aro* rule would require the very public for whom the broadcast was intended to "do-it-yourself." See 377 U.S. at 495.

Respondent also argues that if there is a right to receive, broadcasters and Muzak will no longer have to pay for the programs they originate. Res. Br. 67-68. Respondent's purported fears are based on the false analogy between the broadcaster and petitioner's an-

tenna service.[24] A broadcaster is an originator of programs and it makes no difference whether he uses his own studios to originate or gets his program from a distant source (whether from a network studio by common carrier or reception off the air from another station for rebroadcasting).[25] In either event, the broadcaster retains his personal responsibility for originating the programs. Muzak is an originator of programs and provides equipment to make the programs audible in their subscribers' establishments.[26] Implying in law a license to receive, therefore, in no way affects the application of the copyright law to broadcasters or Muzak.

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[24] The brief amicus of the All-Channel Television Society attaches as an appendix a rate card of a community antenna operator who is also engaged in the closed circuit television business. The rate card plainly relates to the closed circuit operation and *not* the community antenna service.

[25] The license implied in law for the public to receive does not change the prohibition in § 325(a) of the Communications Act (47 U.S.C. § 325(a)) against rebroadcasting without the consent of the originating station.

Respondent speaks of "strenuous objection" by petitioner's antenna service to "rebroadcast " by the Clarksburg television station of the programs of another station using the signal from petitioner's antenna service for that rebroadcast. Res. Br. 9. The reason for petitioner's concern was that the telephone company, with whom it had to negotiate pole rental agreements, would regard unfavorably the loss of its network connection fee if WBOY got its signal from petitioner's CATV instead of using the telephone lines. Petitioner's concern was unrelated to programs or competition with the station. A 801.

[26] Muzak fits the description in *Jewell-LaSalle,* where the "translation into audible sound" (283 U.S. at 200 201) of the music "by instrumentalities under its control" (id. at 201) constituted what the Court called "essentially a reproduction" (*id.* at 200) which "amounts to a performance" (*id.* at 201).

2. We turn now to the reasons why the Solicitor General was correct in his conclusion that there is a license implied in law to receive broadcasts off the air with antennas of the public's choice, including CATV systems, and why he was incorrect in his conclusion that there should be a limitation on that right.

The Solicitor General begins his analysis with the assumption that petitioner is contending for an "implied license" in favor of CATV systems that is "tantamount to holding that once a copyrighted work was licensed to anyone, it was irrevocably and entirely committed to the public domain." Mem. 9. Respondent echoes this view. Res. Br. 35, 41. This is a great overstatement of petitioner's position. Our position is only that when a copyright owner licenses the broadcast of his work for "reception by the public," he has "released" *that broadcast* (not the copyrighted work) for simultaneous reception off the air by the public, utilizing any antenna and set it chooses. There is no suggestion that the work itself is thereby committed to the public domain—no suggestion that the copyright owner may not license other broadcasts. The copyrighted work is no more "dedicated" by reception of that broadcast when a member of the public uses the services of CATV than when he uses his own antenna to receive the broadcast. The only contention, and the only issue, is the public's right to receive broadcasts off the air with the assistance of their own antenna, a cooperative antenna, a master antenna or CATV.

Respondent recognizes the decisions holding that the authorized sale of the patented article exhausts the patent monopoly with respect to that article, and holding that the same is true under the Copyright Act with

respect to the sale of a copy of a book, but respondent denies any applicability of that principle to the situation where the copyright owner *licenses* a broadcast. Res. Br. 40-41. Respondent is wrong, however, in thinking the difference between a sale and a license to be a difference of substance in this context; it is merely one of form and method. When the copyrighted article is a book, the nature of the medium is such that the normal method of release to the public consists of the sale of copies. When it is a television motion picture of the kind involved here, the normal method of release is through the licensing of broadcasts. The controlling principle does not reside in the nature of the respective media or in the different methods of utilization thereof by the copyright owner. The controlling principle is rooted, rather, in the *public policy* considerations that, once the copyright owner has been rewarded for releasing to the public (by whatever appropriate means) a particular embodiment of his work, the primary policy of the Copyright Act—the policy of obtaining for the public the benefits of authors' works—applies to prevent the monopolist from imposing a further restriction on the public's enjoyment of that particular embodiment (whether by resale of the copy of the book, or by reception of the broadcast). Only by disregarding the public interest lying at the heart of the Copyright Act, and manifest in the implied-license cases, can respondent take the position that its act of licensing a television station to broadcast to the public confers no right on the public at all.[27]

[27] Respondent states "To license another to perform a copyrighted work 'publicly', or 'in public', is not to 'release' it 'to the public'. . . . A license is merely a waiver, personal to the licensee, to the extent it provides, of the copyright owner's exclusive right to perform his work in public." Res. Br. 33-34.

The Solicitor General explains his suggestion that the license implied in law to receive broadcasts should be limited to the Grade B contours because a broader license would be inconsistent with the Congressional mandate to "maximize television service through the extensive use of local stations" (Mem. 9); he also argues that a limit to Grade B contours will avoid a diminution of the value of a copyrighted work due to transmissions into a distant market where CATV penetration is "substantial." Mem. 10-11. Neither concern warrants limiting the implied license to the Grade B contour. The regulatory scheme of the F.C.C. deals with these concerns in the carriage, non-duplication and distant signal rules.[28]

With respect to small communities (in the category the Solicitor General calls "unserved and under-served areas" (Mem. 17)) beyond the Grade B contours of a broadcasting station, the Commission commences its discussion of "The Major Market, Distant Signal Policy and Procedure" in the *Second Report and*

[28] The F.C.C.'s regulations deal with situations where there may be substantial "CATV penetration" of distant markets. As the Solicitor General notes, the F.C.C. has ". . . adopted a distant-signal rule applicable to CATVs in the top 100 television markets, which again is geared to the Grade B contour concept and which prohibits the extension of signals beyond a station's Grade B contour into one of these major markets except after an evidentiary determination in each case that such extension would not be detrimental to local television service in the affected area." Mem. 13. The regulatory scheme adopted by the Commission also protects stations in markets below the top 100 markets, as the Solicitor General's Memorandum also makes clear. *Ibid.* Of course, the Commission also regulates all microwave use by CATV.

A number of the amicus briefs refer to reception of broadcasts of educational stations by CATV. The F.C.C.'s CATV carriage and non-duplication rules apply to both commercial and educational stations.

Order with the following description of CATV's contribution to the public interest (¶ 139):

> "We have previously found that CATV can make an important contribution to the public interest, and we adhere to that judgment. CATV, along with other auxiliary services, has made a significant contribution to meeting the public demand for television service in areas too small in population to support a local station or too remote in distance or isolated by terrain to receive regular or good off-the-air reception. It has also contributed to meeting the public's demand for good reception of multiple program choices, particularly the three full network services."

Thus adoption of the Solicitor General's limitation would restrict CATV in an area where CATV makes an "important" and "significant contribution."

The Solicitor General suggests that an advertiser may not intentionally buy coverage in these small distant communities. Even assuming this to be true, it should not be controlling here. The right of the public to receive broadcasts is not based on whether an advertiser may want to reach a particular audience among those who can receive the broadcast off the air, but upon the public policy underlying the Communications Act and the Copyright Act. Members of the television viewing public in these communities also purchase products advertised on television and participate in the economic system which provides advertising revenues and the copyright royalties. To deny an implied license to persons living in the small underserved communities beyond the Grade B contour is to impose an additional charge upon them, which is discriminatory and not warranted or justifiable under the economic scheme supporting the American system of

broadcasting or by the Communications and Copyright Acts.

Implying a license to receive broadcasts in the station's Grade B contour accomplishes, as the Solicitor General notes, the harmonizing of the Federal Communications Act, the antitrust laws and the copyright law. Mem. 6-7. However, the "coalescence" (Mem. 16) of the policies of these statutes is still only partial. In addition to the Communications Act considerations discussed above, there is surely still a "potential for monopolization" (Mem. 6) by reason of the copyright owner's control over CATV for reception off the air outside the Grade B contour, which is common to a great many CATV systems. In five out of ten station-contour situations petitioner's off-the-air reception is in the Solicitor General's infringing category, as they are located shortly beyond the B contour. The B contour does not mark the boundary where reception off the air is possible; at the same time, where there is no microwave (and there is none involved here), reception off the air near the B contour is in the general area the station serves and involves only a minor extension beyond the B contour. Accordingly, the license implied in law should encompass all off-the-air reception.

3. Respondent's attack on the Solicitor General's conclusion that there is an implied-in-law license turns on the premise that the issue before the Court arises only under the copyright law and that there is no relevant policy of the Communications Act to be considered. Respondent asserts that regulation of CATV by the F.C.C. is "grounded on no communications need, and has no purpose other than to remedy the unhealthy consequences of the inability, up to now, of copyright owners to enforce copyright policy with regard to

CATV." Res. Br. 57. The F.C.C. and every government official who has considered this matter disagrees.[29]

The F.C.C. in issuing its regulations concluded that CATV contributes significantly to the nationwide plan for TV service. The "goal" in issuing the CATV regulations was "to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States (§§ 1 and 303(g) of the Act), both those who are cable viewers and those dependent on off-the-air service."[30] The affirmative contribution of CATV to communications policy was described in the *Second Report and Order* (¶ 139):

> "In thus contributing to the realization of some of the most important goals which have governed our allocations planning, CATV has clearly served the public interest 'in the larger and more effective use of radio.'"

This conclusion was underlined by the F.C.C. in its decision in *In re Shen-Heights TV Assoc.*, Docket Nos. 17391-94 (released Feb. 23, 1968), where it said (¶ 10):

> "Underlying the entire Second Report are the allocations considerations embodied in Sections 307 (b); 303(h) of the Act. We have a nationwide plan for TV service. *CATV can and does con-*

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[29] The F.C.C. of course has not "announced"—as respondent extravagantly states (Res. Br. 57, see also *id.* at 59)—that the communications policy with regard to CATV "is wholly subordinate to copyright policy." Nor would the F.C.C. have authority so to rule.

[30] *Second Report and Order*, ¶ 47.

tribute significantly to fuller effectuation of that plan." (Emphasis supplied.)[31]

The Solicitor General favors a construction which "harmonizes" and brings about a "coalescence" of copyright policy, communications policy and antitrust policy. The Register of Copyrights, speaking of a proposed copyright bill, stated that CATV copyright liability "is the only major issue that is inextricably bound up with policy questions in the communications field; these are questions of national importance that can affect the course of radio and television communications in this country for years to come."[32]

4. In its attack on the Solicitor General's recommendation for a license implied in law within the Grade B contour, respondent argues that the "economic realities" point to the license implied in law "as being 'appropriate' only in some never-never land, in the world of make-believe." Res. Br. 64. The F.C.C.[33]

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[31] The Commission also stated (¶ 10):

"... CATV, as a concomitant to extending the service area of stations beyond their Grade B contours (or changing the nature of service from little watched Grade B to principal city service), can be subjected to a reasonable requirement that it also promote the 'public interest in the larger and more effective use of radio' in this respect. That is what the carriage and nonduplication rules do. . . . '[T]he requirement for carriage of local stations, in a very real allocations sense, furthers our responsibility to prescribe the areas to be served by television broadcast stations (Section 303(h) . . .'."

[32] *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 3, at 10.

[33] *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 3, at 79-80.

and Columbia Broadcasting System[34] do not see it as "make-believe" that a copyright proprietor can reasonably expect to be fully compensated by the royalties he receives from the broadcasting station for all viewing within the normal coverage area.[35]

Respondent now criticizes the Solicitor General for accepting these economic facts of television[36] and concluding from those facts that a license implied in law in the Grade B contour cannot have a "substantial adverse impact on the incentive to create . . . ." Mem. 11. Respondent argues that supply and demand "in the market where the licensee broadcasts" determines the royalties, and makes the startling statement that (Res. Br. 62):

> "First, the royalty for a license to broadcast a copyrighted motion picture is *not* calculated on the basis of the size of the television station's audience, or the amount of its advertising revenues. . . ." (Emphasis in the original.)

In fact, royalties are generally related to the size of the licensed station's audience and in some cases are specifically "calculated" on the station's income from

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[34] *Id.* at 220.

[35] Petitioner's offer of proof on television economics (A 1321-24) is discussed in its main brief at pp. 15-16, 90-94.

[36] Respondent's position has been that the "economic realities" are irrelevant to the issues before this Court (A 1313-15), that copyright can be exercised by the proprietor "at his pleasure and exclusively for his own profit" (Res. Br. 64, quoting from *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 130 (1932)), and that "it makes no difference how much the copyright owner collects, whether once, or twice, whether much or little, so long as it is acceptable to him." (Brief for Plaintiff-Appellee in the United States Court of Appeals for the Second Circuit at 93.)

advertising.[37] In its complaint respondent has asserted that the amount of license fees "depends to a large extent on the size of the television audience for said motion pictures in the local coverage area of the licensee, but not outside thereof." A 145. And in answers to petitioner's interrogatories, respondent stated that one of the factors used by its sales department in establishing its price lists was "the size of the potential television audience in the local coverage area" and another factor was the station's "rate cards." R 4038.[38] ASCAP in its amicus brief (at 15) flatly states that "the economics of the performance branch of the entertainment industry are ordinarily geared to apportionment of royalties on the basis of

[37] If respondent's statement were correct, it would mean that the copyright owner granted the license to broadcast the copyrighted work to the station's audience, regardless of the size of the audience. It follows that respondent has been paid for broadcast to the station's audience which has therefore the right to receive, without further payment for that reception. The same conclusion that the copyright owner has been paid is clear in these cases where the royalties are specifically "calculated" on the station's income from advertising and where, as is commonly true, royalties are related generally to the size of the audience.

[38] NAB states (NAB Br. 5) that a broadcasting station's "revenues are obtained from advertising and are large or small depending upon the size of its viewing audience."

Respondent also argues that viewers added by CATV reception within the B contour are insignificant in numbers to a larger market station and thus will not produce any "impact on its advertising revenues." Res. Br. 62. This overlooks the fact that television stations in Pittsburgh, Wheeling and Steubenville (as petitioner offered to prove, A 1323), which would presumably be a much better judge as to what would increase their advertising revenues than respondent, knew of and advertised reception by the public in and around Clarksburg and Fairmont and promoted or solicited carriage by CATV systems and viewing of their broadcasts by subscribers to CATV systems.

the receipts of a particular user. . . . [t]he royalties paid by a commercial broadcaster are related to its receipts from advertisers. . . ." ASCAP and BMI make it plain that their fees are a percentage of the station's gross receipts. Moreover, petitioner offered to prove that respondent itself had licenses with royalties "measured" by the station's income from advertisers. A 1324.

The economics of the television industry demonstrate that a license implied in law for CATV reception would not destroy incentive to create.[39]

III

The Minimum Area of the Public's Right To Receive Is the B Contour

1. The Solicitor General has acknowledged a license implied in law within the Grade B contour of a station, which he states is "the most feasible tool for defining, however roughly, the normal service area . . . ." Mem. 15. However, he would limit this license by what he calls a "*caveat* for special situations." *Ibid.* Using the example of Washington and Baltimore stations where the Grade A contours of the stations in one city cover a part or all of the second city, and the Grade

[39] Between 1956 and 1966 (the period for which figures are available and the principal years of growth of CATV) the amounts paid for programs by the television industry rose from $380 million in 1956 to $1,073 million in 1966. In the same period, the gross revenues of the television industry rose from $896.9 million to $2,203 million. If CATV "inhibited" growth, it is not visible in the figures. (The data are taken from records at the Commission summarized in *TV Broadcast Financial Data—1966,* F.C.C. No. 5317, Public Notice, released August 25, 1967, Tables 1 and 8, and *Broadcast Revenues, Expenses and Income of Television Broadcast Industry—1956,* F.C.C. No. B-49308, Public Notice, released August 22, 1957, Table 5.

B contours encompass and extend beyond the other city, he expresses concern that it "might appear unfair to imply a license to carry copyrighted works licensed to other stations whose Grade B contour includes that area, at least where it can be shown that local and outside stations actively seek exclusive licenses to perform the same works." *Ibid.* He proposes that these situations be decided *ad hoc* on a case-by-case basis, presumably with the result of imposing infringement liability in some cases even though the persons receiving the signals through the CATV systems were within the normal service area (the B contour) of the broadcasting station. We believe that if it should be deemed necessary to fashion a limitation on the license to receive off the air, the minimum area of the public's right to receive is the B contour and that the Solicitor General's caveat does not warrant a further limitation within the B contour.

The Solicitor General proposes that the test be whether it is "unfair" to imply a license without discussing what unfairness he believes relevant. Reference to the Television Factbook, which publishes reproductions of the contour maps of all television stations as filed with the F.C.C., shows that a B contour overlap such as Washington/Baltimore is not an isolated situation. There is a substantial overlapping of many television-station service areas throughout the United States. The F.C.C. considered the problem of overlapping service areas of television stations in the *Second Report and Order* (¶151). After pointing out that under its CATV rules "with possibly only the rarest exception, CATV activity which does not involve extension of a signal beyond its Grade B contour may freely continue" (*id.*), it went on to note (*id.* n. 69) that "if two major markets each fall within one an-

other's Grade B contour (*e.g.*, Washington and Baltimore)", the situation will be dealt with by appropriate petition "in the unusual case where problems of this nature might arise." Thus, the Commission faced and is prepared to deal with the overlap problem (including the specific example) cited by the Solicitor General in the context of the public interest and the place of CATV in the national communications plan.[40]

The Solicitor General does not openly state that the purpose of his caveat is to protect the copyright owner's (or the station's) desire to exploit the copyright by a system of exclusive licenses, but that is the inference from the Memorandum. It is difficult to believe that the Solicitor General gave full consideration to the consequences of this use of exclusivity contracts.

The NAB argues strongly for exclusivity and a consideration of its position shows the serious monopolistic consequences of the adoption of the caveat. The NAB professes concern with the injury it alleges is inflicted by CATV when "the local station has paid for exclusive performance rights in its service area and finds its audience dissipated because a CATV system imports and distributes the same program." NAB Br. 30. It claims injury "whether the invaded area is adequately or inadequately served . . . ." *Id.* at 31. But the F.C.C. in its coverage and non-duplication rules gave stations the degree of exclusivity which the Commission concluded was in the public interest. It is apparent that the NAB's complaint is that the F.C.C. is not according the broadcasting industry the full degree of protection from competition that the stations would like to have. The broadcasters wish to be left

[40] Overlap was, of course, an issue before the F.C.C. in the *Southwestern Cable Co.* cases, Nos. 363 and 428, this term, assigned for argument with this case.

free to negotiate with the copyright industry exclusivity provisions of such scope as to eliminate reception of competing broadcast signals in their claimed service area.[41] Absent some restraining influence, this is precisely what would happen.

The license agreements entered into with film suppliers often give television broadcasters the rights to film "packages" sometimes containing hundreds of films for license periods varying up to as much as 5 years for a specified number of runs or for unlimited runs. See A 145-50. If exclusivity provisions in such contracts may lawfully be extended to or construed to apply to reception by CATV, it is within the power of the broadcast industry and/or the copyright proprietors to destroy any CATV system whose presence is thought competitive to a broadcast station or which the copyright proprietor feels may depress the value of a potential license to a station. The antitrust laws would offer little protection if the Court were to approve the right to practice the exclusivity which the NAB and respondent are seeking.

The copyright owner, free to use exclusivity, can be expected to license the highest bidder. The average CATV system with 1350 subscribers at a typical rate of $5.00 per month (annual gross revenues of $81,000)

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[41] The desire of the broadcaster to be free of competition contrasts with the purpose of the Communications Act. See *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940):

> "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."

has no bargaining parity with television broadcast stations, and stations can be expected to buy exclusive rights in their service areas if such rights are effective to prevent any reception by the public using CATV of the signals of a competing station broadcasting these programs.

It is no answer to say that the copyright owner will not permit the destruction of CATV systems since they are potential licensees. Notwithstanding the efforts of NAB and other amici to paint CATV as a giant industry threatening the destruction of television broadcasting as it is known today, the facts are that the industry, as the Solicitor General noted (Mem. 7 n. 4), is "relatively diffuse." It is basically a small-town business.[42] These small systems do not have the economic potential to bid against a television station with its enormous audience which wishes to hold a service area free or nearly so from the competition of the signals of other stations.

In the past the Commission has had to step in and limit the unfettered use by the networks of the sword of exclusivity to cut off competitive services which would "deprive the listening public of many programs that might otherwise be available."[43] The Commis-

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[42] See amicus brief of National Community Television Association, p. 6. Even under the prediction for the growth of CATV quoted by respondent (Res. Br. 73), the average annual gross of the systems in 1985 would only be approximately $100,000 per system.

[43] See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 200 (1943). By its Chain Broadcast Regulations adopted in 1941 and subsequently made applicable to television (47 C.F.R. ¶ 73.658), the F.C.C. prohibited stations from entering into contracts with networks pursuant to which stations were bound not to broadcast programs of any other network and which prevented the network from licensing a station other than its affiliate to broadcast a program rejected by the affiliate. The Commission's jurisdiction to adopt such rules was affirmed by this Court.

sion has dealt with the matter of exclusivity which concerns the Solicitor General; its carriage and nonduplication regulations, which give a degree of exclusivity to the local stations, "represent a fair balancing of the competing interests [broadcast and CATV], and properly accommodate both industries and thus, the public interest 'in the larger and more effective use of radio' . . . ." [44]

The "coalescence" of copyright, communications and antitrust policy which the Solicitor General sought by acknowledging a license implied in law would disappear in the inundation of suits to decide what restrictions should be imposed on the public at the behest of a copyright owner or the station who concludes that reception by the public is "unfair" because he believes that larger profits would be possible by practicing exclusivity. The rights of the public should be paramount, and no argument for private regulation by exclusivity contracts justifies imposing a limitation on the public's right to use whatever antenna it chooses in order to receive broadcasts within the B contour.

2. The NAB attacks the Solicitor General's acknowledgment of the license in law in the Grade B contour. In support, it seeks to give the impression that a spokesman for the National Community Television Association acknowledged that reception by a CATV system within the Grade B contour is unfairly injurious to a copyright owner by commencing a quotation with the words "in this situation" without identifying the situation. NAB Br. 29. Even a cursory reading of the testimony makes it abundantly clear that the "situation" to which the spokesman was addressing

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[44] *Second Report and Order*, ¶ 109.

his remarks related solely to "distant stations," *i.e.*, "where a CATV system is located beyond the normal reception range of a television station [Grade B contour] [and] carriage is not compulsory under the Commission's rules." [45]

F.C.C. Chairman Hyde's remarks and the letter of the Commission from which the NAB selectively quoted (NAB Br. 44) were also addressed to the same legislative proposals which provide for exemption from copyright liability within the B contour (subject to certain exclusivity provisions).[46] In the same hearings, Chairman Hyde explained the Commission's views regarding reception within the B contour:

> "I particularly mentioned the circumstances where a community antenna would serve entirely as a community antenna service, simply improving the delivery of the signal within the normal service area of the station. In such an area, the station would have purchased copyright privileges, and the improvement in its delivery would not seem to justify the addition of another charge.

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[45] *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 3, at 87. Even with regard to this "distant station" situation, the spokesman urged, "[n]evertheless, there are policy considerations which dictate that under certain conditions a license should be compulsory with provisions for a reasonable license fee defined by statute," and referred to underserved areas. *Id.* at 87. Moreover, this entire discussion was in the context of "proposals" for a legislative solution which would "represent a fair accommodation of the interest of the viewing public and the private interests of the copyright owner." *Id.* at 86.

[46] In the same context the NAB quotes (NAB Br. 43) from a part of the *Second Report and Order* regarding the F.C.C. decision to suggest that Congress consider extending § 325(a) (consent required for rebroadcasting) to CATV without noting the F.C.C.'s conclusion: "We are not in a position to state whether a Section 325(a) approach would be effective and *fully consistent with the public interest.*" ¶ 153(iii) (emphasis supplied).

> "Well, actually what our regulations do is require that the local CATV system perform the function of a CATV system and carry the local station signals. Actually, in requiring the CATV system to carry the local stations' signals, we are simply requiring of them that they perform an antenna service, not a distribution service. We do not believe in these circumstances that an additional copyright payment would be required." [47]

A similar statement appears in the letter from which the NAB quotes.[48]

The conclusion that the entire predicted B contour area is the station's normal service area and that there is no justification for limiting the license implied in law to receive within the B contour is underlined by the F.C.C.'s recent decision in the *Shen-Heights TV Assoc.* case, *supra* p. 25. The Commission held that

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[47] *Hearings Pursuant to S. Res. 201 on S. 1006, supra* note 3, at 80.

[48] The letter of the Commission on H.R. 2512 referred to by the NAB (NAB Br. 44) contains the following paragraph on reception within the Grade B contour:

> "*Local signals.*—CATV systems would be exempt from copyright liability to the extent that they carry signals within the Grade B contour, unless carriage of the signal, with respect to particular programming, conflicts with a local broadcaster's exclusive rights in the area as to such programs (see subparagraph 3 below). This exemption for local signals accords with the Commission's carriage rules and indeed would be an incentive for the CATV to carry the local station. It permits CATV to bring programs already paid for by the local station to persons within the prescribed service area of that station, while at the same time, it helps remedy those situations where because of terrain or for other reasons, good reception of the local signal throughout the station's prescribed coverage area is not possible." *Hearings on Regulatory Agencies before the House Comm on Interstate and Foreign Commerce,* 90th Cong., 1st Sess., Ser. No. 90-1, at 575 (1967).

its CATV rules required carriage by a CATV and non-duplication protection "even though a viewable off-the-air picture is not available in any part of the CATV community . . . ." ¶ 10. The Commission thus views its carriage and non-duplication rules as a significant means of assuring coverage within the station's B contour, thereby fulfilling its allocations policy. The conflict that would exist between a rule of CATV copyright liability and the F.C.C.'s requirement that CATV systems "carry" local stations upon request is brushed aside by respondent, on the apparent basis that the Copyright Act would have to take precedence and the carriage requirement be discarded. Res. Br. 59. The stations that the requirement is designed to aid would thus be sacrificed—and with them the public interest that the F.C.C. has found to be served by the requirement—to the copyright owners' demand for license fees. The Grade B contour has become the area in which the Commission will assure service by requiring carriage by CATV. Since this requirement would be imposed whether or not a signal is available off the air in any part of the CATV community, no justification exists for fashioning a limitation within the Grade B contour.

CONCLUSION

"The overall problem," the Solicitor General states, "is a large one, with substantial ramifications in the fields of copyright policy, communications regulation, and antitrust law." Mem. 1. The F.C.C. has adopted what the court below called "detailed, carefully graduated rules" (A 1366-67) to deal with "the multifaceted and complex" problems raised by CATV (A 1366) and, as Chairman Hyde has said (p. 36 *supra*), the result of the F.C.C. rules is that CATV provides "an antenna service, not a distribution service."

Adopting a novel interpretation of the Copyright Act which extends the copyright monopoly over a new development not contemplated by the Congress will have the anticompetitive consequences which the Solicitor General fears. Private control by the copyright owners will supplant the communications regulation of a governmental agency which can focus on the proper role of CATV in the national television plan. We come back to the principle which the Solicitor General finds established in *White-Smith* where this Court refused to make such an extension of the copyright monopoly—"this Court could hold that until Congress acts specifically it should not by its own action extend the copyright monopoly without any qualification into a wholly novel and uncontemplated area." Mem. 7.

The decision below should be reversed.

Respectfully submitted,

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